IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 182 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

MAHAVIR BUILDERS

Appearance:

1. INCOME TAX REFERENCE No. 182 of 1988
MR AKIL KURESHI with MR MANISH R BHATT for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 30/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This is a reference made by the Income-tax Appellate Tribunal, Ahmedabad under sec.256(1) of the Income-tax Act, 1961 (hereinafter referred to as `the Act'). The reference is at the instance of the revenue for the assessment years 1979-80 and 1980-81. The question referred for our opinion is as under:-

"Whether the Tribunal was right in law in holding that since Smt.Kailashben Family Trust was not a partner in the assessee firm, the payments of commission to Shri Jayantilal Chhababhai Patel in the capacity as trustee of the said trust could not be disallowed u/s.40(b) of the I.T. Act,1961?"

2. While completing the assessment for assessment years 1979-80 and 1980-81, the Income-tax Officer disallowed the sums of Rs.20,560/- and Rs.14,536/respectively by invoking the provisions of sec.40(b) of the Act. The amounts in question constituted payment of commission to Shri Jayantilal Chhababhai Patel. In the assessment orders for the concerned years, the Income-tax Officer made reference to Smt. Kailashben Jayantilal Family Trust of which Shri Jayantilal was a trustee and further the ITO also made a reference to Shri Jayantilal C.Patel in his capacity as trustee and representative of Shri Govindbhai C.Patel Family Trust which trust is a partner in the assessee firm. The Income-tax Officer further observed that there was nothing produced before him to show that in fact the services mentioned in the agreement under which Shri Jayantibhai was paid commission were actually performed by Shri Jayantibhai. Hence the ITO disallowed the aforesaid payments made to Shri Jayantibhai Patel.

3. In appeal, the CIT (Appeals) held that since Smt.Kailashben Jayantibhai Family Trust was not a partner in the assessee-firm, the disallowance could not be made under sec.40(b). The Tribunal confirmed the said order. Hence, this reference at the instance of the revenue.

4. We have heard Mr Akil Kureshi learned counsel for the revenue. Though served, none appears for the respondent-assessee.

5. Mr Akil Kureshi learned counsel for the revenue made a grievance that the Assessing Officer had disallowed the payment of commission to Shri Jayantibhai Patel because the payments were made to Shri Jayantibhai in his capacity as a trustee and representative of

Govindbhai C. Patel Family Trust which was the partner in the assessee firm and that this significant fact was lost sight of by the CIT (Appeals) as well as by the Tribunal. We called upon Mr Kureshi to point out from the reference application whether this grievance was made by the revenue before the Tribunal and whether the question referred was as proposed by the revenue. We are informed, and we also have gone through the papers of the reference application to find, that the revenue had itself proposed the question which ultimately came to be referred by the Tribunal and which is quoted hereinabove. Even in the enclosure to the reference application, the following statements and submissions are made:-

> "The Income Tax Officer disallowed and made an addition of Rs.20,560/- for assessment year 1979-80 and Rs.14,536/- for assessment year 1980-81 under section 40(b) of the Income-tax Act, being commission payment to Shri Jayantibhai Chhababhai Patel, the trustee and representative of Smt.Kailashben Jayantilal Family Trust.
>
> The Appellate Assistant Commissioner observed that since Smt. Kailashben Jayantilal Family Trust is not a partner in the assessee firm, payment of commission to Shri Jayantilal C. Patel, trustee of Smt. Kailashben Jayantilal Family Trust cannot be disallowed under section 40(b) of the Act.
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> The Appellate Tribunal confirmed the order made by the Appellate Assistant Commissioner.
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> In the premises the question of law set out in paragraph 4 of the Reference application arises out of the order of the Tribunal."

6. It is thus clear that the revenue itself proceeded on the footing that payments of commission were made to Shri Jayantibhai Patel as trustee and representative of Smt.Kailashben Jayantilal Family Trust which trust is admittedly not a partner in the assessee firm.

7. The question raised by Mr Kureshi before us was never raised before the Tribunal nor even proposed for reference. The question does not arise from the order of the Tribunal.

8. In this background, the only question to be answered is the one referred by the Tribunal and our

answer to the same is in the affirmative i.e. in favour of the assessee and against the revenue.

9. The Reference accordingly stands disposed of with no order as to costs.

(M.S. Shah,J)

(D.A. Mehta,J)

zgs/-